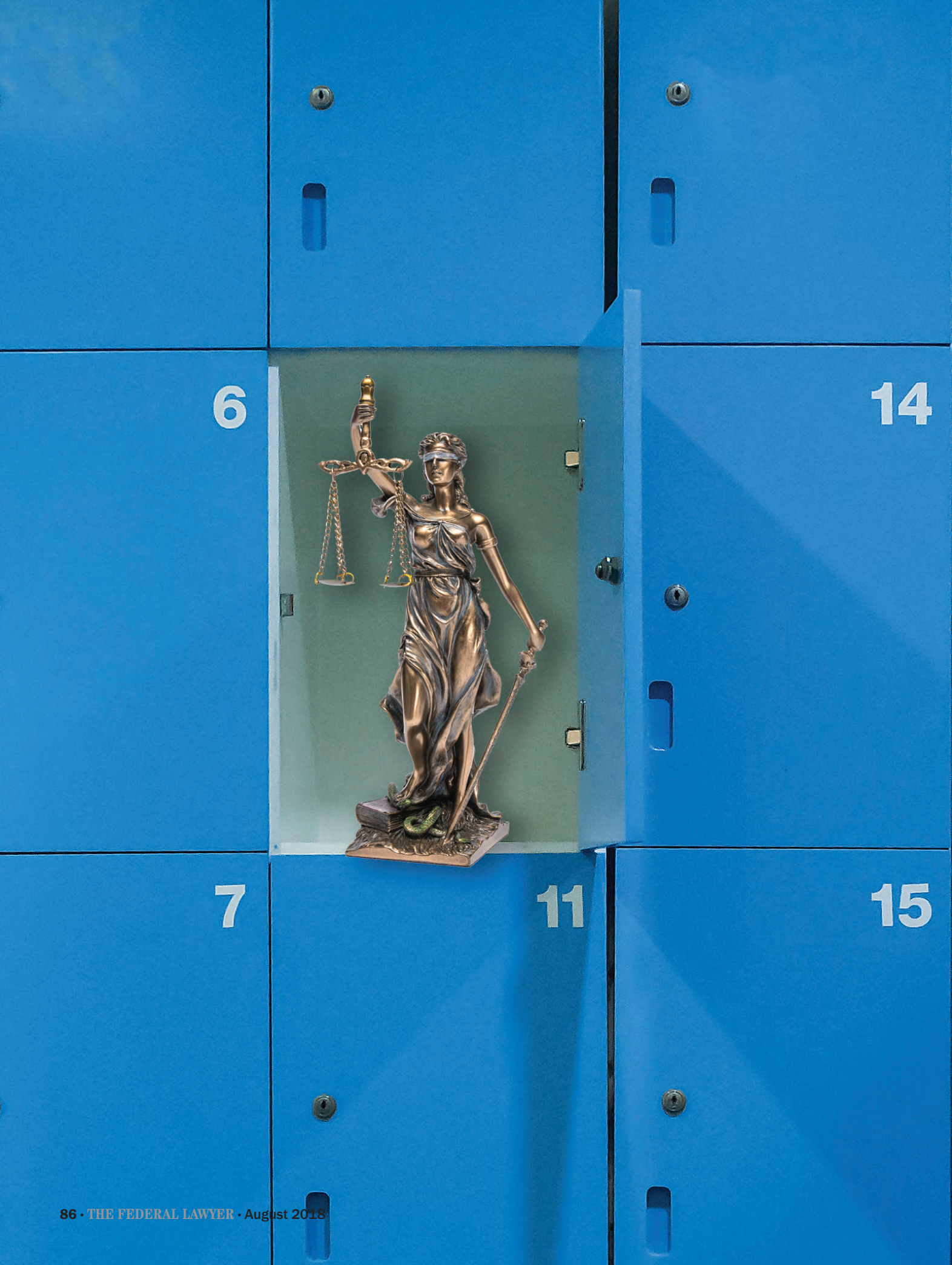
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ACCESS TO JUSTICE FOR THE PRO SE LITIGANT IN MEDIATION: A NEW YORK CITY EXPERIENCE

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Justice Black in *Gideon v. Wainwright*[1] stated that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him" and in the process he raised the awareness of his long-held belief[2] that indeed there is a gap in access to justice in the United States. Since then, while only the criminal litigant is entitled to counsel under the Constitution, both federal and state courts have been establishing many creative and non-traditional initiatives to ensure the essence of fair trials where every defendant is equal under the law. For there to be equality in access to justice, regardless of the constitutional right in criminal court, every person, even the indigent, should be afforded a lawyer to assist him or her.

Today, the aspirational goals and objectives for access to justice remain as elusive as it was in 1963. The reasons may be different. A 2010 American Bar Association (ABA) nationwide survey[3] showed that the number of self-represented litigants was increasing for such critical, life-impacting, and financial situations as foreclosures, housing, and employment. These pro se litigants are taking their cases to court without a lawyer because they cannot afford one. They do so in the face of a challenging and complex court system and with little or no knowledge of the law or the legal nature of their claim. The survey also revealed that the litigants are not doing a good job of representing themselves, thereby leaving the courts and pro bono legal aid services maximally strained and stretching at the seams.[4] In 2018, there continues to be a nationwide acknowledgement (1) of the crisis in the justice system, (2) of the identified gaps, and (3) the concomitant effort to address those gaps.

Access to Justice Initiatives at the Department of Justice (DOJ)[5]

In 2010, the DOJ established an Access to Justice Office to address the "access-to-justice crisis in the criminal and civil justice system." The Office's stated mission is to assist with the efficient delivery of justice for outcomes that are fair and accessible to all regardless of the litigant's wealth or social status. To accomplish the mission, the DOJ works across federal agencies and with state and local justice systems.[6] While a disproportionate number of the impacted litigants are poor, minorities, and not legally trained, the inability to access justice crosses racial, social, and cultural lines. The DOJ, in its role, has promoted and supported dispute resolution techniques that fall outside of the traditional legal responses. It has sought less lawyer-intensive, less formalistic procedures for dispute resolution and for increased access to justice. It has encouraged approaches that are innovative and creative than one would encounter in the traditional justice system. It has done so by providing grants and funding, training and technical assistance, as well as other support services to assist in the resolution of issues affecting health, housing, and education.[7] The DOJ also has encouraged the creation of Access

to Justice State Commissions. New York State has established such a commission.[8]

The New York City Experience

The New York Permanent Commission on Access to Justice has stated that its purpose is primarily to assess the effects of "unmet civil legal needs" and to make recommendations for increasing access to justice. The commission has found ways to increase legal services throughout the state by obtaining adequate funding for legal aid providers and fostering efficiencies and best practices within the courts. To that end, the commission has had strategic planning and workgroup meetings to establish and prioritize sustainable and measureable initiatives. In addition to education and training, to achieve its access to justice goals, the commission has looked at improving the nature of representation to include utilizing limited-scope representation and uses of other professionals.[9]

The District Courts of New York are equally as focused on closing the gap in federal courts. As a result of congressional mandates,[10] they already have used mediation not just to contribute to the efficiencies in the management of the backlog of cases but also to improve access to justice. The court-annexed mediation is a facilitated negotiation process that requires the consent of the parties and uses well-trained, non-court personnel to facilitate the settlement discussions. It offers the litigant a more creative, faster, less expensive, and less contentious resolution to their dispute. Mediation is also a confidential process where the litigant can play a role in determining the outcome of the dispute.

Using mediation to facilitate access to justice did not fully and directly address systemic problems associated with the pro se litigant initiating a case in federal court or negotiating with a represented party. It was not until the intersection of mediation and limited-scope representation that the courts of the Southern District of New York and the Eastern District of New York found success for the pro se litigants. Limited-scope representation, also referred to as discrete tasks, unbundled services or limited-scope assistance allows the attorney to provide discrete services where the client is aware of, or had requested, the limited service offerings.

Here are the SDNY and EDNY success stories.

The SDNY Experience[11]

"The dearth of services for pro se litigants is one of the reasons the US District Court for the Southern District of New York established a program to provide limited-scope representation to pro se parties in mediation of employment matters…."[12] —Rebecca Price, Director, ADR Program.

Pro se cases represent approximately 21 percent of the cases filed in the SDNY Courts each year.[13] The Director, ADR Program, in defining access to justice, noted that it means different things to different people. Bearing this in mind, it was easy to see that access to justice would be difficult for a pro se litigant, with a very important issue to be heard; who finds it extremely difficult to file initial court papers because the litigant is not legally trained, has no counsel, and communicates predominantly in Creole.[14] If that pro se litigant has little or no support to navigate the complexities of the courts, then there could be no access to justice, by any definition.

Despite the robust mediation program in the SDNY, the court continued to observe the need to improve its access to justice for pro se litigants. There remained an imbalance of power between the litigants where one was represented by counsel and the other was self-represented. The mediation program allows the pro se litigant to choose to use mediation, to mediate before a trained mediator, and to do so at no cost. But because the self-represented litigant would still need to file motions, understand the legal facts of the case and even to disengage himself from the emotional part of the case, more support was required in the form of representation.

Even as the court maintains a panel of pro bono counsel through law firms' pro bono programs, and through referral to legal aid and law school clinics, it was difficult to get the legal support. Compounded with the increase in pro se cases, it proved difficult to find counsel who would commit to an employment discrimination case, for example. The limited-scope representation has proven to be a working solution and in the SDNY, specifically in employment discrimination cases.

Here, under the court's alternative dispute resolution program,[15] pro se litigants filing an employment discrimination claim may be referred to meditation. Litigants are notified via the SDNY's Mediation Referral Order for Pro Se Employment Discrimination Cases that the case is being referred to mediation. The order also informs them that the Pro Se Office will locate a limited-scope attorney for the plaintiff. It further allows both parties to choose not go forward in mediation—the plaintiff has 14 days within which to object to the mediation or to the appointment of counsel for purposes of the mediation and the defendant may ask for the order to be vacated. Should the pro se litigant choose to resolve the dispute in mediation, the pro bono attorney and the litigant meet to define the scope of the work and to enter into the limited-scope agreement. The agreement would define

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When on Jan. 3, 2011, the SDNY's Chief Judge Loretta A. Preska issued an administrative order that increased mediations in "The Mother Court" by 400 percent, professor David Michael White, director of Conflict Management Program at Seton Hall Law School, met with the Office of Pro Se Litigation and together developed the Representation in Mediation Practicum that is the focus of this article. There were two main goals: first, was the need to promote access to justice within historically vulnerable populations—race, age, socio-economic status; and second was the desire to provide the students with the experience of working in the most prestigious district court of the nation.

Since then, more than 150 student advocates have met their goals for nearly 300 otherwise pro se litigants. Today, Seton Hall is the largest provider of pro bono mediation/settlement conference advocacy to the SDNY litigants.

Says Judge Preska, "In the Southern District of New York, 'access to justice' means more than 'access to settlement.' Seton Hall's student advocates restore dignity to those who all too often lack a voice within the legal system. This initiative is the biggest 'win-win-win' of which I can conceive."

the area for which the limited-scope representation would cover. The pro bono attorney is able to control the scope of representation as long as clients are informed. The order that is issued recognizes this and allows the attorney to remove himself or herself from the case once it is done. The attorney could be responsible for any of a variety of discrete duties: filing the mediation position papers, explaining the legal issues of the case to the pro se litigant, preparing the litigant to negotiate the settlement, assisting the litigant to negotiate the settlement, or reviewing a settlement agreement. Because of the limited-scope, the pro bono attorney does not have to represent the pro se litigant should the case go to trial. The engagement ends with the end of the mediation.

In 2011, the limited-scope representation program was energized with the support of approximately 51 Seton Hall Law students who were participants in the school's Representation in Mediation Practicum under the licensed supervision of Adjunct Professors. The students had the opportunity to advocate on behalf of the pro se litigant in the employment cases by preparing mediation statements, negotiating on behalf of the pro se litigant, participating in the mediation sessions and helping to draft settlement agreements.

Then in 2015, the SDNY awarded a grant to the legal aid service, NYLAG, to fund its clinic for access to justice work. Representatives from the SDNY's Pro Se Office, the court-annexed mediation program and NYLAG have been collaborating on how best to improve access to justice using mediation and pro bono advocacy for these pro se litigants in employment cases.

Sharing Some Results

Rebecca Price, director of the ADR program, passionately speaks of the success of the limited-scope representation in mediation. It is good to hear the parties who are benefitting, not just from mediation but from advocacy for pro se litigants. "Referrals to the program have increased substantially in recent years," she says, "from 33 in 2013 to 94 in 2015." The success is definitely due to the limited-scope representation and the increased number of volunteer attorneys who have successfully mediated these cases. In 2014 and 2015, the average settlement rate for these cases was reported at 67 percent.

When one considers the underlying goal of justice for all, mediation with its expeditious, efficient approach to resolving a dispute is good. Combine that with access to free mediators and the pro se litigant is greatly advantaged. Yet not all pro se litigants understand mediation or desire mediation. Having an advocate to explain the mediation process and to take the pro se litigant through the parts of the process that are most challenging, have led to the reported success. The advocate may be more measured in the process while the pro se litigant with a lot of emotional attachment may not be.

Additionally, the court benefits. The judges and court personnel are now able to be more impartial. The mediator can remain the neutral party in the mediation process, and pro bono attorneys, particularly the law school students, can feel accomplished having negotiated a settlement in mediation. In New York, where pro bono hours must be reported for biannual licensing renewals, all New York volunteer attorneys benefit.

The EDNY Experience[16]

In the EDNY, the experience is not vastly different. Here mediation is governed by the Local Civil Rule 83.8. Litigants are allowed pro bono representation in mediation for certain types of employment cases. These are cases under Title VII of the Civil Rights Act of 1964, i.e., discrimination based on race, color, gender, religion and national origin; the Age Discrimination in Employment Act of 1967, i.e., discrimination based on age; and Title I of the Americans with Disabilities Act of 1990, i.e., discrimination based on disability or perceived disability. Like the SDNY, mediation is free for pro se litigants, as is the limited-scope representation.

The EDNY's program is known as the Mediation Advocacy Program (MAP). Under that program, a Judge issues an order referring the case to the MAP if (1) the litigants identify mediation as a means for resolving the dispute; or (2) the judge, sua sponte, determines the case is appropriate for mediation. The ADR administrator will attempt to find a pro bono attorney for the pro se litigant. Pro se litigants are cautioned that there is no guarantee that a pro bono attorney will be available, and that the court is dependent upon a roster of volunteer litigators to accept the limited-scope assignments. Once assigned, the pro bono attorney then contacts the pro se litigant to define the terms of the engagement. To ensure a roster of knowledgeable and well-trained pro bono attorneys for these types of cases, the EDNY holds training twice per year that includes instructions on the use of limited-scope representation.

The program has grown in the EDNY and there are plans to continue strengthening it. Remarkable changes have been reported over two reporting periods—period 1 (2015-2016) and period 2 (2016-2017). In reporting period 1, 15 attorneys volunteered to provide limited scope pro bono representation for pro se litigants in employment discrimination mediations. That grew to 43 attorneys in period 2. In reporting period 1, five cases were referred to the MAP and five pro se litigants were matched with limited-scope counsel for the purpose of mediation. The following reporting period, 21 cases were referred to the MAP and 20 pro se litigants were matched. The settlement rate doubled over the reporting periods from a 20 percent settlement rate to 40 percent.

It is imperative to continue achieving these results, that the ADR department increases the number of volunteer attorneys participating in MAP and keeps the level of engagement high. Thus, in February 2016, the EDNY ADR department co-sponsored a Mediation Advocacy Training, with the SDNY ADR department and the New York City Bar Association ADR Committee, to recruit and train attorney advocates to participate in the EDNY MAP. Additionally, the ADR department works with the City Bar Justice Center's Federal Pro Se Legal Assistance Project to encourage pro se litigants to use mediation in certain cases.

Conclusion

I have had the privilege of working with many attorneys and non-court professionals in the quest for equal access to justice for all. What is most striking for me, whether it is at the state or federal court, is the gratitude that the pro se litigants exude for even the simplest of tasks performed. It further impresses me that the justice system has spent so much time and effort to tackle so many areas, particularly in the oft neglected yet life-impacting civil proceedings, to ensure that issues are being identified, gaps recognized, and more importantly, non-traditional solutions designed and achieved. The New York City experiences illustrate this type of commitment and creativity to achieving access to justice. Today, the program of limited-scope representation in mediation focuses on the pro se litigant in employment discrimination cases. How much further we can go

with this type of program? The challenge will be ever-present. I know that the New York experience can be and has been replicated in other federal district courts. But like the first time parent, this ADR practitioner proudly shares the pictures of the New York experience and trust they will serve as examples of how far we can go outside of the "normal" to ensure access to justice. I am confident that it could be just as good as limited-scope representation. I am hopeful that it will be the increased use of less litigious means.

Professor Laurence Tribe, in speaking of limited-scope representation stated to the attendees:

> No substantial improvement in the delivery of needed civil legal services is likely unless we can find a way to stimulate more—and better designed and supervised—pro bono activity … so we simply cannot afford to cling to antiquated rules that, in a misguided application of ethical norms, artificially inhibit willing attorneys' ability to actually perform pro bono services ably and with integrity.[17] ⊙

Endotes

[1]*Gideon v. Wainwright,* 372 U.S. 335 (1963).

[2]In Betts v. Brady, 316 U.S. 455 (1942), Justice Black dissented and noted that the due process clause of the Fourteenth Amendment does incorporate the specific guarantees found in the Sixth Amendment and, as such, the defendant was entitled to counsel.

[3]See Kristen M. Blankley, Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services (2013) (citing results of the nationwide survey).

[4]Id.

[5]Access to Justice, Dep't of Justice, https://www.justice.gov/atj (last visited Aug. 3, 2018).

[6]Kate Benner, Justice Dept. *Office to Make Legal Aid More Accessible Is Quietly Closed,* N.Y. Times (Feb. 1, 2018), https://www.nytimes.com/2018/02/01/us/politics/office-of-access-to-justice-department-closed.html.

[7]Visit the DOJ's Access to Justice homepage for current accomplishments, supra note 5.

[8]The Permanent Commission on Access to Justice was established in 2015 under 22 NYCRR § 51.1.

[9]See N.Y. State Unified Ct. Sys., Justice for All Strategic Action Plan (Dec. 22, 2017), https://www.nycourts.gov/accesstojusticecommission/PDF/JFA-Report-122217.pdf.

[10]E.g., Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658.

[11]Sources for this experience include: Rebecca Price, ADR program director; Rebecca Price, *Limited-Scope Pro Se Program Provides Access and Justice,* 33 GP Solo (2016), https://www.americanbar.org/publications/gp_solo/2016/september-october/dispute_resolution_limitedscope_pro_se_program_provides_access_and_justice.html [hereinafter Price article]; Disp. Resol. Mag. (Spring 2016); *Mediation/ADR,* U.S. Dist. Ct. S.D.N.Y, http://www.nysd.uscourts.gov/mediation (last visited Aug. 3, 2018); *Mediation in Pro Se Employment Discrimination Case,* U.S. Dist. Ct. S.D.N.Y, http://www.nysd.uscourts.gov/pro_bono_mediation.php (last visited Aug. 3, 2018).

[12]Price article; Disp. Resol. Mag., id.

[13]NYLAG Legal Clinic for Pro Se Litigants in the SDNY, First Annual Report: 10/1/2016-9/30/2017.

[14]Supra, note 11.

[15]Governed by Local Civil Rule 83.9 and Procedures of the Mediation Program.

[16]Sources for this experience include: Robyn Weinstein, ADR administrator; *Pro Se Mediation Advocacy Program,* U.S. Dist. Ct. E.D.N.Y., https://www.nyed.uscourts.gov/pro-se-mediation-advocacy-program (last visited Aug. 3, 2018); U.S. Dist. Ct. E.D.N.Y., Alternative Dispute Resolution Report: July 1, 2016-June 30, 2017 (2017), https://img.nyed.uscourts.gov/files/local_rules/2016-2017_ADR_Annual_Report.pdf; U.S. Dist. Ct. E.D.N.Y., Alternative Dispute Resolution Report: July 1, 2015-June 30, 2016 (2016), https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf.

[17]*Justice News, Laurence H. Tribe, Senior Counselor for Access to Justice, Keynote Remarks at the Annual Conference of Chief Justices, Vail, Colo., July 26, 2010,* U.S. Dept't of Justice, https://www.justice.gov/opa/speech/laurence-h-tribe-senior-counselor-access-justice-keynote-remarks-annual-conference-chief (last updated Apr. 28, 2016).